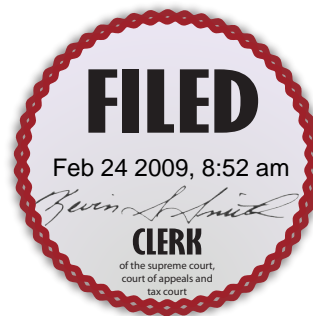


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**ANNA E. ONAITIS**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**MICHAEL GENE WORDEN**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JOSHUA L. MILLER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 57A04-0807-CR-445

---

APPEAL FROM THE NOBLE SUPERIOR COURT  
The Honorable Michael J. Kramer, Judge  
Cause No. 57D02-0801-CM-53

---

**February 24, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Joshua Miller appeals his conviction for Class B misdemeanor criminal mischief. Specifically, he contends that the evidence is insufficient to support his conviction, that his sentence is inappropriate, and that the trial court abused its discretion by ordering him to pay restitution. We find that the evidence is sufficient to support his conviction and that his sentence is not inappropriate. However, because we also find that the trial court abused its discretion by ordering restitution when no evidence of actual loss was presented at Miller's trial, we affirm in part and reverse in part and remand.

## **Facts and Procedural History**

On December 15, 2007, Joshua traveled with his wife, Courtney, and three children<sup>1</sup> to the residence of Amanda Swartz in Avilla, Indiana. Amanda lived at the home with her husband, Eric, and her son. Joshua is the father of Amanda's son. Although Joshua's visitation rights were suspended, Joshua intended to see his son and give him gifts.

While Courtney and the three children waited in the car, Joshua walked up to the front door and knocked. Amanda answered the door, and Joshua asked to see his son. Amanda told Joshua that his son did not want to see him. Amanda and Joshua began arguing, and Amanda, tired of fighting, shut the door and locked it. Tr. p. 10. Immediately after shutting the door, Amanda heard a loud "boom" at the door. *Id.* The noise awakened Eric, who came to the door and opened it. Amanda and Eric saw Joshua walk away and return to the car. Joshua and Courtney then sped away.

---

<sup>1</sup> As Joshua's counsel notes, it is unclear from the record whether Joshua is the father of Courtney's three children. Appellant's Amended Br. p. 5 n.2.

Eric then noticed damage to the front door where a piece of the frame surrounding the window in the door was shattered. *Id.* at 25. Amanda then called the police to report the incident. Neither Amanda nor Eric had noticed any damage to the door earlier that day.

The State charged Joshua with Class B misdemeanor criminal mischief. Ind. Code § 35-43-1-2(a)(1). After his bench trial, Joshua was found guilty as charged. The trial court sentenced Joshua to 180 days in Noble County Jail but suspended the sentence to 365 days probation. The trial court also ordered Joshua to perform 120 hours of community service, complete an anger management program, attend the Right Relations program, and pay fines and restitution as a condition of his probation. Joshua now appeals.

### **Discussion and Decision**

On appeal, Joshua argues that there is insufficient evidence to support his conviction, that his sentence is inappropriate, and that the trial court abused its discretion by ordering restitution.

#### **I. Sufficiency of the Evidence**

First, Joshua argues that the State presented insufficient evidence to support his conviction for criminal mischief beyond a reasonable doubt. Specifically, he contends that the State failed to prove beyond a reasonable doubt that he, rather than Amanda when she shut the door, is responsible for the damage to the door.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting

the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the factfinder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* at 147.

In order to convict Joshua of Class B misdemeanor criminal mischief,<sup>2</sup> the State had to prove that he “recklessly, knowingly, or intentionally damage[d] or deface[d] property of another person without the other person's consent[.]” I.C. § 35-43-1-2(a)(1). Joshua argues that because neither Amanda nor Eric saw him hit the door and Courtney testified that she saw from the car that he did not hit the door, the State's evidence is merely speculative. Here, the State presented evidence that Joshua walked up to the front door of the house alone. Joshua and Amanda then began arguing. After Amanda shut the door to end the argument, Amanda and Eric each testified they heard a loud boom at the door. Upon opening the door, Amanda and Eric saw Joshua walking away and then observed damage to the door, which was undamaged earlier that day. *See Brown v. State*, 827 N.E.2d 149, 152 (Ind. Ct. App. 2005) (“When a conviction is based on circumstantial evidence, this court will not disturb the verdict if the fact finder could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt.”).

---

<sup>2</sup> If the pecuniary loss is at least \$250 but less than \$2500, the offense is a Class A misdemeanor. I.C. § 35-43-1-2(a)(2)(A).

This evidence is sufficient to find Joshua guilty beyond a reasonable doubt. Joshua's argument in this regard is merely a request that we reweigh the evidence, which we cannot do. Thus, we affirm Joshua's conviction.

## **II. Inappropriate Sentence**

Next, Joshua argues that his sentence of 180 days in jail suspended to 365 days probation is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, Joshua went to Amanda's home although his visitation rights were suspended and asked to see his son. When Amanda denied him visitation, Joshua struck the door to the home with enough force to shatter part of the trim on the door. Although his son was inside the house and neither Amanda nor Eric saw Joshua strike the door, the sound from the impact was enough to wake Eric from his sleep. Further, according to Courtney, the front door of the home was visible from the car. As a result, the three children in the car were exposed to Joshua's angry act.

As for Joshua's character, because the offense is a misdemeanor, there is no presentence investigation report. We know from Joshua's testimony at trial that he is employed. Tr. p. 33. But we also know that Joshua was convicted six or seven years ago of methamphetamine possession. *Id.* In sum, Joshua has failed to persuade us that his suspended sentence is inappropriate. Thus, we affirm Joshua's sentence.

### **III. Restitution**

Finally, Joshua argues that the trial court abused its discretion by ordering him to pay restitution as a condition of probation. Specifically, Joshua contends that the trial court's order was based on a future expense that may or may not be incurred. Alternatively, Joshua contends that the trial court failed to specify the manner in which Joshua must pay and to inquire into whether Joshua had the ability to make such a payment.

A trial court has the authority to order a defendant convicted of a crime to make restitution to the victims as a condition of probation. *See* Ind. Code §§ 35-38-2-2.3; 35-50-5-3. "The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. Restitution also serves to compensate the offender's victim." *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008) (citation omitted), *reh'g denied*. A restitution order is within the trial court's discretion, and we will only review the order for an abuse of that discretion. *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), *trans. denied*.

Indiana Code § 35-50-5-3 provides in relevant part:

(a) Except as provided in subsection (i) or (j), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a

condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of:

(1) property damages . . . the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate) . . . .

I.C. § 35-50-5-3(a)(1). A restitution order must be supported by sufficient evidence of actual loss sustained by the victim or victims of a crime. *Rich*, 890 N.E.2d at 49. "The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence." *Id.* (quotation omitted).

We agree with Joshua that the trial court abused its discretion in ordering restitution. At trial, Joshua's counsel asked Amanda on cross-examination whether the door had been fixed. Amanda responded that the door had not been fixed. Tr. p. 10, 12. At sentencing, the State failed to present an estimate of the cost of repair or replacement or any other reasonable evidence of the victims' loss. Because no evidence was presented on the cost of repair or replacement, the trial court abused its discretion by awarding restitution. *See T.C. v. State*, 839 N.E.2d 1222, 1227-28 (Ind. Ct. App. 2005) (finding inadequate factual basis for trial court's restitution order), *reh'g denied*.

The State argues that because Joshua was charged with criminal mischief as a Class B misdemeanor instead of a Class A misdemeanor, we can infer that the damage caused was less than \$250. *See* I.C. § 35-43-1-2(a)(2)(A). We decline to infer from the prosecutor's charging decision the cost of repairing Amanda and Eric's door. We remand to the trial court for a new sentencing order consistent with this opinion.

Affirmed in part and reversed and remanded in part.

RILEY, J., and DARDEN, J., concur.